

**THE 1990  
AMERICANS WITH DISABILITIES ACT**

**JOURNAL ARTICLE  
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**This Command College Independent Study Project is a FUTURES study of a particular emerging issue in law enforcement. Its purpose is NOT to predict the future, but rather to project a number of possible scenarios for strategic planning consideration.**

**Defining the future differs from analyzing the past because the future has not yet happened. In this project, useful alternatives have been formulated systematically so that the planner can respond to a range of possible future environments.**

**Managing the future means influencing the future--creating it, constraining it, adapting to it. A futures study points the way.**

**The views and conclusions expressed in this Command College project are those of the author and are not necessarily those of the Commission on Peace Officer Standards and Training (POST).**

# INTRODUCTION

In July, 1990 President Bush signed into law The Americans With Disabilities Act (ADA). The Act became effective for most state and local law enforcement agencies on January 26, 1992. California has had a comprehensive disability discrimination law since 1975<sup>1</sup> and federal disability discrimination legislation has existed since 1973 in the Rehabilitation Act. The 1990 ADA establishes disabled citizens as a protected class, increases existing protections, and includes local police agencies and private businesses in its coverage. The ADA may indeed be the most important piece of federal legislation since the 1964 Civil Rights Act.

Despite existing state and federal legislation, it is still believed by many people that persons with disabilities continue to encounter discrimination.<sup>2</sup> The ADA is designed, in many ways, to increase both protections and enforcement authority at the state and local levels. The ADA prohibits all forms of discrimination against physically and mentally disabled persons who are otherwise qualified for employment.<sup>3</sup> The ADA also requires employers, including law enforcement agencies, to make "reasonable accommodations" for applicants and employees who are able to perform the "essential functions" of the job the individual seeks or holds.<sup>4</sup>

Those police managers and executives who consider themselves responsible for future policy planning recognize the ADA as a

particularly significant event. If important law enforcement employment trends are visualized together as a flowing river, the ADA represents a large stone dropped into the current creating substantial ripples and waves, disturbing that flow. As with any identifiable institution, law enforcement employment policies and systems have a history, current state, and a future.

The history of law enforcement hiring and employment practices over the last thirty years represents a rate of change that has accelerated rapidly over the last ten years. Thirty years ago, law enforcement agencies reflected a work force that was in most ways very similar. The typical sworn officer was a white male, had served a brief military assignment, and was selected for his command bearing and a personality that focused on an ability to control his work, family, and personal environment.

The sworn officer work force of today represents a degree of diversity that can be perceived as threatening by many police managers and executives. Today's police executives are used to an organizational culture that stresses control and respect for authority. Today's sworn officer is much more interested in having some personal control over his or her own working environment. The fact that today's police force is less likely to be dominated by a particular majority of similar looking and acting individuals creates many challenges for law enforcement executives.

Today's sworn police work force contains substantial diversity in terms of age, gender, race, ethnic background, and education. Work force diversity has resulted in a wide range of employee values, needs, and preferences. Police managers and executives who have had twenty to twenty five years of experience in a police culture that stressed policies, procedures, and management control are already having a difficult time motivating employees and responding to employee frustrations and demands. Police managers have a tendency to look forward to a return of the "good old days." The informed police executive realizes that the rate of change in the working environment will only increase and the real impacts from work force diversity are yet to come.<sup>5</sup>

The ADA requires law enforcement agencies to re-examine their hiring and employment policies and systems. It is not surprising that the primary focus has been on existing selection processes as the day-to-day hiring procedures represent the most likely source of discrimination challenges. The general police community strongly supports the public policy of prohibiting all forms of unlawful discrimination against disabled individuals. The literature reflects, however, a substantial concern for the police executive's responsibility to maintain high standards of officer physical and mental condition in order to avoid liability for foreseeable injuries to citizens, employers, and fellow officers. In his letter to the Executive Officer of the Equal Employment Opportunity Commission, former President of the International

Association of Chiefs of Police (IACP), Lee P. Brown, strongly urged an ADA exemption for law enforcement agencies.<sup>6</sup> A former N.Y.P.D. Commissioner, Brown argued that "The law enforcement community is in a rather unique 'Catch-22' position regarding the ADA and the EEOC regulations. We face liability both ways: We can be sued for not hiring someone who is disabled; and we can be sued for hiring a disabled person who then, because of the handicap, does not accomplish some vital law enforcement function resulting in a lawsuit for negligence in hiring."<sup>7</sup>

Despite the initial attention being given to hiring practices, it is becoming apparent that the entry level position for police agencies is likely to remain the patrol officer assignment well into the future. Law enforcement agencies are currently making substantial progress in establishing "essential tasks" for the patrol officer position. The broad range of essential physical and mental requirements for the beat officer is likely to confine the extent of "reasonable accommodations" to a level considered acceptable by both disability advocates and police executives.

The ADA impacts that are creating more challenging future issues are relevant to the uncertainties associated with accommodating experienced officers who are injured on the job. In many ways it will be sworn officers who develop injuries, illnesses, and addictions, while employed, that are likely to contribute more directly to additional diversity in the sworn work force.

IACP President Brown made an interesting point in his letter to EEOC Executive Officer Hart when he wrote, "reasonable accommodations are more easily made" for an individual "who becomes disabled on the job."<sup>8</sup> The point of Lee Brown's remark was intended to emphasize the difficulties associated with lowering police entry level selection standards. It would be inaccurate for anyone to perceive that accommodating disabled, experienced officers will be an easy task. The variation of strategies being developed by very competent and knowledgeable police executives to deal with disabled officers indicates that this issue will present police management challenges well into the future.

A number of independent forces will operate to keep the accommodation of disabled officers in a continuous state of flux. ADA requirements will encourage broad-based accommodation of disabled employees to preserve employment opportunities. Pressures and stress associated with police work may continue to result in mid-career job burnout encouraging sworn officers to decline job accommodations and seek safety disability pensions instead.

In California, half of the 32,500 public safety workers who have retired from approximately 700 agencies are collecting disability pensions.<sup>9</sup> Wendy Hamilton, risk manager for Palm Springs, where 78 percent of their retired police officers are collecting disability pensions, maintains that police officers don't typically quit their jobs and go on to other occupations. They get

themselves classified as industrially disabled and then go on to other jobs and careers.<sup>10</sup> In many police agencies in California, tax free, mid-career disability retirement awards exceed 65% of total retirement pensions.<sup>11</sup> The national average is 20%.<sup>12</sup> As cities work to reduce mid-career police disability retirements, police executives will debate over the cost-benefit analysis of sworn officer modified duty positions but disabled officers will become a rapidly growing new perspective in the broad range of work force diversity.

Accommodation efforts that involve assignments of disabled officers to sworn officer specialized positions may seem perfectly reasonable to the Chief but receive a very different reaction from the rank and file police labor representation unit that considers these assignments covered by a collective bargaining agreement.

Until very recently, issues such as disabled sworn officers were considered to be personnel or human resource issues. It is apparent that disability in the sworn ranks should be a priority management issue. Managing disabled employees, under the ADA, will affect the way a police force is organized, staffed, and operated in the future. This article will explore one of the more pressing future issues facing law enforcement executives under the ADA.



**Issue:**

What impact will the ADA have on the ability to manage a police work force containing disabled officers in 2002?

**The Sub-Issue:**

What strategies will exist to accommodate sworn officers with permanent job-related disabilities under the 1990 ADA?

## **PERMANENT MODIFIED DUTY POSITIONS**

In a lecture to Class 16 of the California Peace Officer Standards and Training (POST) Command College, Oren Harrari compared the state of executive management today to a "white-water experience."<sup>13</sup> It was the beginning of a very informative presentation that discussed the tendency of some organizational managers experiencing job stress to remark: "as soon as things settle down, we will be o.k." The fact is that most police managers are operating in a very high stress, constantly changing work environment and "settling down" is not in the future forecast.

The ADA will have a very important effect on law enforcement policy planning. Most police executives have either received formal training or have reviewed the literature on the ADA application to police employment issues. Many executives are aware that the ADA is extremely complex and EEOC guidelines do very little to resolve

even basic questions about its application. It has become clear that Congress did not intend to write a civil rights act that would cover every eventuality. The EEOC enforcement guidelines are full of semi-specific language and recommendations that issues will be resolved on a case-by-case basis. Despite confusing statutory language and concerns about balancing its responsibility to its employees with maintaining a high quality of service to its citizens, the law enforcement community has actively supported the ADA. The national Police Executive Research Forum (PERF) expresses its commitment to ensuring "that workers with a disability are provided with the same benefits and privileges of employment as those enjoyed by employees without disability" in its 1992 Model Police Policy on The ADA.<sup>14</sup>

Those police executives that have had time to think about future impacts of the ADA while struggling with employee background investigation, polygraph, psychological, and medical screening procedures, are anticipating future challenges relating to permanent modified duty positions. Not only does the white water appear to be getting rougher, but there are very few side eddies in which to stop and rest briefly.

As police agencies modify entry level selection procedures to comply with ADA guidelines, law enforcement executives are beginning to plan for their work force of the future. Issues

regarding permanent modified duty positions for sworn officers are becoming priority concerns.

The history of modified, or light duty, positions in law enforcement agencies comprises more of a review of organizational culture than the documentation of written policies and procedures. Despite an historical police emphasis on written policies, it is not unusual to find that, until very recently, very few medium-sized California police agencies had written guidelines to cover permanent modified duty positions. Depending on the organizational culture, the willingness of a police agency to "find a place" for an officer injured "on or off the job" ranged from organizations that, at one time, had as many as 20% of the sworn work force in long term or permanent modified positions<sup>15</sup> to departments that had no modified duty positions that were permanent.

It is clear that, in some departments, the organizational culture reflects a strong desire to "take care of their own" and an organizational philosophy of "accommodation" existed well before the ADA was passed. In smaller police departments with limited budgets, the ability to retain an officer at full pay and benefits when physical disability prevents normal street assignment is very difficult to justify.

The rather liberal Public Safety Workers Compensation and Disability Retirement Statutes in California provide most California

police officers with a lifetime pension of 50% of salary for job-related disabilities and 33% salary for non-industrial cases. The system is considered so liberal by some taxpayer groups that they are convinced that it encourages abuse and is overdue for legislative reform.<sup>16</sup>

Within this environment, law enforcement executives are understandably having difficulty forming consistent strategies for dealing with disabled sworn officers under ADA requirements. A somewhat oversimplified review of ADA requirements indicates that the basic relevant elements of the Act are: The ADA protects "qualified individuals with a disability."<sup>17</sup> A "qualified individual with a disability" is someone who can perform the "essential function" of the job, "with or without reasonable accommodations."<sup>18</sup>

Legislative history establishes that Congress viewed "essential functions" as "job tasks that are fundamental and not marginal."<sup>19</sup> Extensive EEOC guidelines provide further evaluation criteria but additional discussion is unnecessary and impractical in this article.

There is a critical relationship between the establishment of "essential functions" and the requirement to make "reasonable accommodations." Reasonable accommodations include job restructuring and reassignment to a **vacant** position, for which the employee is qualified.<sup>20</sup> Under the 1973 Rehabilitation Act,

accommodation was restricted to the position the disabled employee occupied.<sup>21</sup> Legislative history indicates that Congress did not intend to enable a disabled individual to "bump" another individual out of a position to create a vacancy.<sup>22</sup> However, if accommodation in the employee's current position is not possible, the employer should consider transfer to a vacant position for which the employee is qualified to "prevent the employee from being out of work and the employer from losing a valuable worker."<sup>23</sup>

This somewhat complicated relationship of ADA concepts will cause considerable confusion over future policies to accommodate disabled officers. A substantial number of medium-sized police agencies are likely to be concerned about reducing the size of their so-called "able bodied" sworn work force.

Their policy positions will present the argument that they can accommodate injured officers in **temporary** modified duty positions, but must limit that accommodation to a period of time, e.g., 6 months. These agency executives will be reluctant to recognize **permanent** modified duty positions.

The leading case on this issue is Simon v. St. Louis County.<sup>24</sup> In Simon, Officer Gary Simon was rendered a paraplegic after being shot in the line of duty. The St. Louis County Police Department terminated Officer Simon because he could not make a forceful arrest and could not be transferred among all positions in the

Department. Officer Simon sued for his job arguing that he could perform the duties of several departmental positions, including Internal Affairs Investigator, School Safety Patrol, Communications Bureau, or as a desk officer. Officer Simon eventually lost his case but at least one attorney and prominent authority on the ADA is convinced that this 1983 case would be subject to severe criticism under the 1990 ADA.<sup>25</sup> David A. Snyder of the labor law firm of Aitchison, Hoag, Vick, and Tarantino in Portland, Oregon is convinced that the forceful arrest requirement is not an essential function for all positions within many Departments. The ADA's reasonable accommodation requirement would compel the Department to accommodate Officer Simon's disability by job restructuring, reassignment to a vacant position, and modification of its transfer policy.<sup>26</sup>

Attorney David Snyder's forecast of the ADA impact receives support from a number of prominent authorities. In an interview on April 7, 1993, Alan Kalmanoff, an experienced criminal justice law and policy planner, observed that the ADA will make it very difficult for a medium-sized police agency to deny a permanent accommodation to a currently employed officer. An officer who suffers a disability but is still capable of performing essential functions of some police department position will have a very strong case in demanding continued employment.<sup>27</sup>

Several police agencies currently have written policies covering **permanent** modified duty positions. The San Jose P.D. is negotiating to limit their permanent light duty positions to 30 but has developed an extensive list of qualified assignments. The Glendale P.D., since the Stuessel v. City of Glendale 141 Cal App 3d.1047 case in 1983, has continued to maintain permanent modified duty positions and currently has ten officers in that capacity. The city of Anaheim has a written clause in a collective bargaining agreement with their Police Officers Association to maintain a mandatory, permanent, modified duty program. The program is restricted to industrially injured officers and currently has 13 sworn officers enrolled.<sup>28</sup> In 1992, Anaheim promoted an officer from one modified duty position to another modified duty position in the sergeant's rank (Property Supervisor). The Long Beach P.D. has approximately 30 departmental positions designated for officers with "permanent physical restrictions." Sgt. Jerry Gadbaw, Long Beach P.D. personnel officer, reports that their department has no problem accommodating disabled officers. The Long Beach P.D. has also promoted an officer from a modified assignment to another modified duty position.

It seems clear that, despite some practical resistance within the law enforcement community, the future sworn work force of medium size departments will contain disabled officers in what are now considered modified duty positions. The next question is - how will these officers be treated?

# DISABLED OFFICERS AND WORK FORCE DIVERSITY

It would not be surprising to learn that many police managers expect an increased number of disabled sworn officers in the work force as a result of the ADA. As the number of disabled officers are accommodated, they will represent a significant component of work force diversity. In his 1991 edition of **Managing Workforce 2000 - Gaining The Diversity Advantage**, author David Jamieson recognized **disabilities** as an existing work force diversity perspective along with age, gender, culture, education, and values.<sup>29</sup> The significance of recognizing disabled officers in a diversity context is that it allows police managers to recognize that they will have different values, needs, and preferences. They will be motivated by different circumstances and will have different life styles and choices to make.

The significance of managing work force diversity, in dealing with future law enforcement issues, has been recognized by others concerned about physical and mental disabilities experienced by sworn officers. In 1990, Steven Wilkins conducted a study of **Managing Disability Claims and Retirements For The California Highway Patrol**.<sup>30</sup> One of his most significant recommendations, in administering disability claims, is the enhancement of the work environment. In his words, "If law enforcement administrators hope to have a positive influence on the issue of disability claims and



retirements, their training must place an emphasis on sensitivity to employee attitudes."<sup>31</sup>

In an article that severely criticized California law enforcement agencies for failure to control an excessive rate of mid-career police disability retirements, Emily Harrison, Finance Director in Palo Alto, California, takes the position that ineffective initial treatment of injured officers by managers is a primary cause of unnecessary mid-career disability retirements.<sup>32</sup>

R. William Mathis noted in his article, **How Workers' Compensation Injury Affects Police Officers**, that risk management statistics in California reveal that only 25 percent of police under 35 years of age will make it to mandatory retirement age without a physical or mental disability.<sup>33</sup> Job stress has become a common companion to many law enforcement disability claims. Mathis notes that observation of 25 stress retirees suggests that 75 percent would be working today if all parties (involved in the workers' compensation claim) had emphasized the need for the officers to go back to work and had assisted them in developing success on the job.<sup>34</sup>

These observations add considerable support to the theory that strategies designed to accommodate disabled officers through modified duty positions must recognize the influence of work force diversity. Even the most progressive law enforcement executives consider modified duty positions as an "accommodation." It is very

likely that the best management intentions to "accommodate" disabled officers will be rejected by our best employees and be destined for failure.

Many highly qualified sworn officers who have been disabled on the job have found themselves "accommodated" in meaningless, non-productive, dead-end assignments. These make-work positions result in otherwise qualified officers feeling like members of a second class. The officers find that fellow officers feel sorry for them but tend to shy away. They feel rejected and battle to avoid being labeled as a malinger.<sup>35</sup> Modified duty working environments reflect precisely the complaints that many of the 43 million disabled persons in the United States have been making for years.<sup>36</sup>

In a medium-sized police agency, the challenges include not only creating permanent, modified duty positions but also managing those positions in a manner that motivates the employee and allows him or her to fulfil his or her value to the organization.

A 1990 survey of a diverse group of managers, human resource professionals, and organization development practitioners was conducted by David Jamieson.<sup>37</sup> Jamieson's survey was intended to identify the work-related values that the participants believed were most important to the majority of people in their work force. The results of this survey provide some interesting insight into work place values that will be especially applicable to sworn

officers occupying modified duty positions. The survey revealed that the top four important values to employees are:

■ **Recognition for Competence and Accomplishments -**

Police officers are recruited and selected, in large part, on their ability to work without close supervision and make independent decisions. Sworn officers want to be recognized for their independent judgement as well as their value, skills, and accomplishments. When an officer is placed in a modified duty assignment, he or she is typically provided with a written description of the tasks he or she is no longer allowed to perform. The majority of modified duty positions provide a disabled officer with very few opportunities to feel that their contributions are sincerely appreciated by superiors and peer officers.

■ **Respect and Dignity -**

Officers, like any other employee, want to be respected for who they are. The history of this country's treatment of disabled persons shows a progression from being regarded as incomplete human beings or "defective" to a more humanitarian belief that the disabled should be given care and protection.<sup>38</sup> Officers have a strong desire to be valued, not pitied. Many modified duty

"accommodations" provide little opportunity for the officer to feel valued.

■ **Personal Choice and Freedom -**

It is well established that employee morale is based significantly on the extent to which they feel that they have the opportunity to eliminate the things that bother them at work. Employees who are particularly unhappy in a particular assignment are many times reacting to a perception that they have very little control over their immediate working environment. Here again, modified duty assignments in medium sized departments that provide little opportunity for rotation tend to deny the officer one of the values that an employee recognizes as very important.

■ **Involvement at Work -**

Sworn officers, especially, want to be kept informed, included, and involved in important decisions. Officers in modified duty positions are frequently left "out of the loop" in important decisions. An officer in a modified duty position is likely to feel very uneasy about his status with an organization and is particularly sensitive to an environment that fails to involve him or her in decisions that affect the quality of their work environment.

Future organizational strategies designed to manage a sworn work force that includes disabled officers will most surely include efforts to reduce alleged abuses in disability claims, adoption of a policy to establish a reasonable number of permanent modified duty positions, and a voluntary fitness program to help prevent injuries. The success of these strategies will depend on the ability of managers to look beyond the requirement to "accommodate" disabled officers and recognize their special need to be provided with opportunities for legitimate achievement and recognition.

## CONCLUSION

The law enforcement work force of the future will be likely to contain an increasing number of officers considered today to be unqualified for employment due to physical or mental disabilities. The **1990 ADA** is clearly intended to require all employers, including police agencies, to make reasonable accommodations for applicants and employees who would have been considered physically and mentally unqualified prior to 1990. A growing effort to reduce a perceived abuse of police disability pension funds will also encourage officers disabled on or off the job to seek continued employment as sworn officers through job accommodations.

Most police managers perceive the future impact of required accommodation to involve some form of modified duty positions. It is not unreasonable to forecast that future police agencies will recognize that not all sworn positions within a police department require the same physical capabilities. Police agencies, in the not too distant future, may not recognize modified duty positions at all (i.e., different sworn positions simply have different physical requirements).

As we visualize this scenario, it becomes clear that the effective management of officers in modified positions, or disabled officers simply included in the same work force, will require an appreciation of the fundamental values of individual employees in a diverse work force. It is only recently that police managers have been expected to recognize significant diversity among the sworn work force. Police managers have dealt effectively with women entering the work force in the 1970's, and increased racial minority recruiting in the 1980's. The inclusion of men and women, who were formerly considered physically and mentally disqualified, in future sworn police work forces has tremendous potential for improving work force quality. A broader recruitment base allows for applicants to offer wider ranges of backgrounds and talents. Community oriented policing requires an ability to assist various components of the community, not simply exercise control. An organizational philosophy that actively accommodates and retains experienced officers disabled on or off the job encourages

rehabilitation and preserves employee talents. These are just a few reasons to believe that the accommodation of disabled police officers will continue to improve the capability of law enforcement to deliver services to its citizens.

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